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In The Supreme Court Of The United States

REGINALD WILKINSON, et al.,
Petitioners,

v.

CHARLES E. AUSTIN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

NOV 26 2004

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INTRODUCTION

Respondents' brief in opposition ("Opp.") confirms, rather than negates, the need for review here. For, just as the Sixth Circuit did below, Respondents here fundamentally misunderstand this Court's decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin v. Conner*, 515 U.S. 472 (1995). That misunderstanding led the panel astray, and it explains why Respondents do not see the conflict between the Sixth Circuit's decision and this Court's precedents, and why they fail to grasp the nature of the circuit split as well.

Hewitt's fundamental teaching was not just its holding that prisons need not establish formal, trial-type procedures to make predictive decisions about placing prisoners in higher-security settings for preventive reasons. Though this resulting holding was important, what was equally important was the principle that led to it. *Hewitt* reached this result by applying the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to this prison-placement context in a categorical way. *Hewitt* taught that no matter how the high the government's interest and the prisoner's interest in the outcome, the deciding factor would always be the third *Hewitt/Mathews* factor, regarding the cost or benefit of additional process.[1] That third factor always weighed against requiring more process—such as the formalized process required by *Wolff v. McDonnell*, 418 U.S. 539 (1974) for retrospective disciplinary proceedings—because extra process does not aid the quality of a highly subjective, predictive decision. Thus, as detailed below, the idea that the Sixth Circuit was getting back to *Mathews* when it rejected *Hewitt* (Opp. at 7) makes no sense, as *Hewitt* already provides a controlling, prison-specific version of *Mathews*, and the Sixth Circuit's contrary reading needs correction.

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[1] The added-value factor was the second factor in *Mathews*, but it was the third in *Hewitt*, so we label it as the third here.

And *Sandin*, quite simply, said nothing about any of this. It dealt only with the baseline question of *whether* a liberty interest exists, and it does not tell us what process is due once an interest exists. The panel's reliance on *Sandin*, then, for the what-process-is-due question, reflects yet another aspect of the conflict with this Court's precedent. This approach also reflects another angle to the circuit split, as some circuits have similarly adopted the errant view that *Sandin* changed the law regarding the process due, while other circuits have properly stayed the course in recognizing that *Hewitt* still controls the question of what-process-is-due when predictive prison-placement decisions are at issue.

Thus, the conflicts are real, and they require review. And as also explained below, Respondents are wrong in arguing that Petitioners discussed the "wrong version" of the prison policy at issue. Opp. at 1–2. The petition should be granted.

A. The decision below conflicts with the Court's decisions because it rejects *Hewitt's* application of *Mathews* and because it misreads *Sandin* to do so.

Respondents mistakenly assert that the decision below did not reject *Hewitt* in favor of *Wolff*, but that the Sixth Circuit merely rejected a "*Wolff/Hewitt* dichotomy," and that the Sixth Circuit merely applied *Mathews* "to a specific set of facts." Opp. at 7. Respondents are wrong, as the Sixth Circuit got it wrong on the law, not the facts, in several ways, and in doing so, it conflicted with this Court's decisions.

First, Respondents and the Sixth Circuit alike fail to appreciate that *Hewitt* established a general principle that the third *Mathews* factor controls in predictive prison-placement cases. To be sure, the Court in *Hewitt* did examine the first two *Mathews* factors, and it did note that the State's interest in maintaining prison safety is high, and that the prisoner's

interest is lower, given that he is already imprisoned and merely challenges his security level or conditions. *Hewitt*, 459 U.S. at 473–74. But the third *Mathews* factor, which looks to the value of additional procedural safeguards, was plainly dispositive in *Hewitt*. That is not surprising in any *Mathews* application, since after all, the ultimate question is "what process is due," so it makes sense to focus on whether extra process adds any value.

Hewitt explained that extra procedural safeguards would not add value because of the *nature* of the decision at issue: because placement decisions are predictive and subjective, they are "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. *Hewitt* specifically contrasted such predictive decisions with the retrospective factfinding that is aided by trial-type proceedings, such as in *Wolff*. *Id.* at 473–74.

Notably, this logic holds true as a categorical matter for *all* such predictive decisions, regardless of any changes in applying the other two *Mathews* factors. So any attempt to distinguish this case from *Hewitt* based on facts concerning the other *Mathews* factors—such as the claim that the placement here is more onerous than that at issue in *Hewitt*—must fail, because *Hewitt's* overriding demand is that extra process should not be required when it adds no value.

Indeed, the Sixth Circuit's decision is notable in this regard, as its purported "*Mathews* analysis" nowhere asserts that the extra process ordered would add anything. Instead, the Sixth Circuit said only, regarding the third factor, that the extra process would not burden Ohio too greatly. App. at 23a. The court mostly focused on the other factors, finding—contrary to *Hewitt's* command—that the nature of the decision did not matter as much, and that the primary factor was the weight of the prisoner's interest in avoiding

supermax placement. *Id.* at 21a–24a. Thus, the Sixth Circuit conflicted with *Hewitt*, and it did so in a categorical way, not a factbound way. That warrants review.

Second, the Sixth Circuit's rejection of *Hewitt* was based solely on its mistaken reading of *Sandin*, and that means that the decision below conflicts with *Sandin* as well. Notably, while the Sixth Circuit ultimately criticized and rejected what it considered a false "*Hewitt/Wolff* dichotomy," it essentially acknowledged that, even in its view, there *was* such a dichotomy pre-*Sandin*, and that it was established by this Court and was properly followed by courts below. App. at 18a–19a. As the Sixth Circuit explained it, cases fit neatly into one side or the other, *Hewitt* or *Wolff*:

> Before *Sandin*, state-created liberty interests of prisoners were either protected by an adversary hearing on the record following *Wolff* ... or a more free-form hearing following *Hewitt*.... Cases following the *Hewitt/Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective, objective or subjective, *Wolff* or *Hewitt*.

App. at 18a (citations omitted). Thus, in the Sixth Circuit's view, the only question was whether *Sandin* somehow changed the *Hewitt/Wolff* framework.

On that question, the Sixth Circuit left no doubt that it thinks that *Sandin* changed everything. It first described the question as unclear: "What is much less clear after *Sandin* is how to determine what process is due to protect that interest." App. at 18a. It then concluded that *Sandin* raises the bar from *Hewitt* regarding what process is due: "We are convinced, however, that *Sandin* called into question not

only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic fashion in which they applied the *Hewitt/Wolff* dichotomy." *Id.* The court also said that *Sandin* shifted the focus from *Mathews'* third factor, regarding the value of extra process, to the first factor, regarding the inmate's interests: "After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake." *Id.*

Respondents adopt the Sixth Circuit's view that *Sandin* changed everything, and that is why, in their view, the decision below does not conflict with *Hewitt*; *Sandin*, they say, changed *Hewitt*. Petitioner Ohio, by contrast, believes that *Sandin* addressed *only* the question of when a liberty interest is created, and did not change the what-process-is-due inquiry. Thus, in our view, the court below not only conflicted with *Hewitt*, but by basing its abandonment of *Hewitt* upon a purported reading of *Sandin*, the panel conflicted with *Sandin*, too.

But more important, whether we or Respondents are right or wrong about whether *Sandin* changed *Hewitt* regarding what process is due, it seems hard to deny that our debate is a legal one about the meaning of those cases, not a factual one. Our dispute does not turn on how "harsh" conditions allegedly in Ohio's Supermax prison; our dispute turns on whether *Hewitt's* analysis survives *Sandin*. And as explained in Part B below, other circuits disagree about this same question, further amplifying the need for review.

Third, the Sixth Circuit not only abandoned *Hewitt*, but it plainly (and improperly) swung to the opposite pole of *Wolff*, and Respondents do not succeed in their attempt to minimize the importance of this holding. To be sure, the Sixth Circuit itself said that it was not "adopting" *Wolff*, as it

said that it was rejecting the "*Hewitt/Wolff* dichotomy," and that language suggests that in the court's view, its return to *Mathews* transcended *Wolff* as well as *Hewitt*. *Id.* at 18a–19a. So Respondents understandably parrot the court's language in disclaiming any adoption of *Wolff*. Opp. at 7.

But if we look past the labels attached (or detached) by Respondents or the Sixth Circuit, the plain mechanics of what the court *did* here show that it adopted *Wolff*-type procedures—and then some—in a case that belongs under *Hewitt*. The court acknowledged that the procedure that the district court imposed on Ohio here "closely tracks *Wolff*." App. 20a. Thus, by affirming the imposition of those procedures, the court imposed *Wolff*-type procedures in a case that does not call for them. The mere fact that the court disclaimed it was adopting *Wolff* does not change that fact.

B. The circuits are split over whether *Hewitt* controls predictive decisions such as the ones here, and that includes a split over whether *Sandin* changed *Hewitt*.

Just as the *Sandin* question underlies the panel's conflict with this Court's decisions, so, too, does that question underlie the circuit split. Properly understood, this further shows the need for review, and it shows why Respondents' attempt to explain away the split is unsuccessful.

First, Respondents are wrong when they wipe away all of the pre-*Sandin* cases simply on the basis that they were pre-*Sandin*. That "distinction," of course, works only if one first accepts that *Sandin* changed things on the what-process-is-due question. If, as we believe, *Sandin* did no such thing, then the conflict fairly includes all of the pre-*Sandin* cases.

Second, even looking at only post-*Sandin* cases, the split is real. On the Sixth Circuit's side of the split, the Ninth Circuit found, as the Sixth Circuit did, that *Sandin* changed

things, thus requiring *Wolff*-type proceedings rather than *Hewitt* process in a predictive-type case. *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). Respondents say only that *Keenan* analyzed *Sandin* in a "cursory fashion." Opp. at 11. The *Keenan* court, however, spent nearly two pages analyzing *Sandin*, and it dutifully followed what it (mistakenly) believed was this Court's precedent, which it thought now required *Wolff* procedures. 83 F.3d at 1088–89. The court properly explained how *Sandin* changed the liberty-interest question, but then it leapt to the conclusion that *if* a liberty interest existed, *then* the prisoner there *would be entitled to* "all of the process he was due under *Wolff*," and for support, the court cited *Sandin*'s statement that it was returning to the due process principles of *Wolff*. *Id.* at 1089. So it plainly—albeit mistakenly—adopted the view that *Sandin*'s "return to *Wolff*" applies to the what-process-is-due question along with the liberty-interest question. Thus, the Sixth Circuit is not alone in reading *Sandin* to have the effect of supplanting *Hewitt* and requiring *Wolff*, even for predictive decisions.

More important, on the other side of the split, both the D.C. and Third Circuits have continued to apply *Hewitt* to predictive-type cases, without changing that approach in light of *Sandin*. See *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997); *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999); *Sheats v. Horn*, 213 F.3d 140 (3d Cir. 2000).

In *Brown*, the D.C. Circuit plainly applied the "*Hewitt-Wolff* dichotomy" that the Sixth Circuit rejected; though it did not use the word "dichotomy," it contrasted *Hewitt* and *Wolff* proceedings in precisely the way that the Sixth Circuit said was no longer appropriate after *Sandin*. *Brown*, 131 F.3d at 170–71. The D.C. Circuit explained that *Hewitt* applied and required only "limited procedural safeguards" to placement decisions, such as the administrative segregation at issue in *Brown*, and it further explained that *Wolff* applied

only where retrospectively-focused disciplinary proceedings were at issue. *Id.* The D.C. Circuit did, as Respondent notes, decline to decide whether a liberty interest existed at all, but that was precisely because the court found it easier to determine that only *Hewitt* process was required, as that could have disposed of the prisoner's claims if the facts on remand showed that he received *Hewitt*-compliant (not *Wolff*-type) procedures. *Id.* at 170, 172.

Respondents also cite, curiously, a footnote in *Brown* in which the D.C. Circuit noted that *if* the prisoner had shown that the process at issue was disciplinary, as opposed to involving a predictive-placement issue, then "more extensive procedural protections" would be required. Opp. at 10 (citing *Brown*, 131 F.3d at 171 n.8). That citation is curious because the footnote confirms, rather than negates, the circuit split, as it shows how firmly the D.C. Circuit holds to the "*Hewitt*/*Wolff* dichotomy" that Respondents and the Sixth Circuit wish to inter. That is, the D.C. Circuit said that *if* the process were disciplinary and retrospective, it would trigger *Wolff*; otherwise, *Hewitt* controls. Compare App. at 18a ("Cases following the *Hewitt*/*Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective....").

Similarly, the additional D.C. Circuit case that Respondents cite, *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), further confirms that the D.C. Circuit sticks to the "*Hewitt*/*Wolff* dichotomy." The prisoner in *Hatch* advanced two independent due-process claims: one against his placement in "administrative segregation," and one against his *separate placement* in "adjustment segregation," a disciplinary placement that was "unlike administrative segregation, punishes individuals for specific, proven acts of misconduct." *Id.* at 848. In analyzing the administrative segregation claim—i.e., the claim relevant

here—the court explained that it was undisputed that if the prisoner "had a liberty interest in avoiding administrative segregation, then *Hewitt* specifies the minimum procedures for placing him in such confinement." *Id.* at 851–52.

Separately, the *Hewitt* court analyzed the independent claim regarding the *disciplinary* segregation, and it is that part of the opinion that Respondents cite. Opp. at 11. To the extent that the D.C. Circuit left open the possibility that more extensive *Wolff*-type procedures might be required for prisoner Hatch's *disciplinary claim*, which was tied to past events, that again merely confirms the D.C. Circuit's continued commitment, post-*Sandin*, to the "*Hewitt*/*Wolff* dichotomy."

Finally, Respondents' attempt to explain away *Shoats*, in which the Third Circuit also continued to follow *Hewitt* post-*Sandin*, is also unsuccessful. Respondents argue that the inmate in *Shoats* "apparently never argued that *Hewitt* procedures were inadequate" and only "contended that his continued long-term confinement in administrative segregation was based solely on his past criminal history." Opp. at 11. But the Third Circuit recognized that "Shoats claims [he was kept] in administrative custody in violation of his Fourteenth Amendment right to *procedural* due process," 213 F.3d at 140, and "reject[ed] Shoats' argument that he has been deprived of the *process* he is due under the Fourteenth Amendment," *id.* at 144. Thus, the court did address the what-process-is-due issue. And the court recognized as a matter of course that *Hewitt* governed that question. The court noted that future predictions alone, even if based on past events, could justify the placement at issue, so *Hewitt* process was enough. *Id.* at 146. And by not addressing *Sandin* in the what-process-is-due part of its opinion, after discussing it extensively in the liberty-interest part, the court recognized that *Sandin* had no effect on any question regarding whether *Hewitt* or *Wolff* process is required.

C. Petitioners cited the right policy.

Respondents insist that Ohio attached the wrong version of the policy at issue, and that we are fighting over the wrong one, but it is Respondents who are mistaken. The version at issue is the one that Ohio adopted in January 2002, which is in the Petition Appendix. As Respondents properly note, Ohio issued this policy after the case began, but before trial, and the trial focused on this one. Opp. at 1. Respondents do not now argue that the earlier pre-January 2002 policy is at issue. Instead, they mistakenly argue that the policy now at issue is the *modified policy that resulted from the post-trial imposition of the court-ordered changes to the policy*. Respondents have it wrong.

First, Respondents misread the Sixth Circuit's statement that "it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue." *Id.*, quoting Pet. App. 5a. In stating that the district court's *modifications* were at issue, the Sixth Circuit meant that the issue was whether those modifications really were constitutionally required, or whether the policy was acceptable without those changes. Second, Respondents' new suggestion—that the Sixth Circuit reviewed the post-district-court policy to see if *that* was good enough—simply makes no sense. Obviously, we want to restore the policy that we had before the courts imposed more rules on us; we do not seek to attack (or need to defend) the court-rewritten version. We did not obtain a stay pending these appeals, so we have had to live under the new court-ordered rules, which required issuing yet another policy to implement those rules. But we want to restore our own rules.

CONCLUSION

For the above reasons, and those in the Petition for Certiorari, the Petition should be granted.

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